No. 91-744
No. 91-902

Supreme Court, U.S.
FILED
MAR 6 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,
Petitioners,

v.

ROBERT P. CASEY, N. MARK RICHARDS, and ERNEST D. PREATE, JR., personally and in their official capacities,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, RHODE ISLAND, TEXAS AND VERMONT AND THE DISTRICT OF COLUMBIA, JOINED BY 13 GOVERNORS, 12 LIEUTENANT GOVERNORS AND 995 STATE LEGISLATORS FROM FIFTY STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JOHN MCKERNAN
Governor of the State Of Maine

DEREK LANGHAUSER
Chief Counsel
Office of the Governor
State House Station # 1
Augusta, Maine 04333
(207) 289-3531

ROBERT ABRAMS
Attorney General of the State of New York
120 Broadway
New York, New York 10271
(212) 341-2250

JERRY BOONE
Solicitor General

MARY ELLEN BURNS
Chief Assistant Attorney General

SANFORD M. COHEN*
Assistant Attorney General in Charge, Civil Rights Bureau

DONNA I. DENNIS
MARJORIE FUJIKI
SHELLEY B. MAYER
Assistant Attorneys General
*(*Counsel of Record)*

(Additional Counsel Listed Inside Cover)

RICHARD BLUMENTHAL
Attorney General of Connecticut
Office of the Attorney General
55 Elm Street
Hartford, Connecticut 06101

CHARLES M. OBERLY, III
Attorney General of Delaware
Office of the Attorney General
8th Floor
820 North French Street
Wilmington, Delaware 19801

WARREN PRICE, III
Attorney General of Hawaii
Office of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813

ROLAND W. BURRIS
Attorney General of Illinois
Office of the Attorney General
500 South Second Street
Springfield, Illinois 62706

BONNIE J. CAMPBELL
Attorney General of Iowa
Office of the Attorney General
Hoover State Office Building
Des Moines, Iowa 50319

MICHAEL E. CARPENTER
Attorney General of Maine
Office of the Attorney General
State House
Augusta, Maine 04330

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202

SCOTT HARSHBARGER
Attorney General of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Office of the Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710

ROBERT J. DEL TUFO
Attorney General of New Jersey
Office of the Attorney General
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625

TOM UDALL
Attorney General of New Mexico
Office of the Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504

LACY H. THORNBURG
Attorney General of North Carolina
Office of the Attorney General
Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

JAMES E. O'NEIL
Attorney General of Rhode Island
Office of the Attorney General
72 Pine Street
Providence, Rhode Island 02903

DAN MORALES
Attorney General of Texas
Office of the Attorney General
Capitol Station, P.O. Box 12548
Austin, Texas 78711

JEFFREY L. AMESTOY
Attorney General of Vermont
Office of the Attorney General
Pavilion Office Building
Montpelier, Vermont 05602

JOHN PAYTON
Corporation Counsel of the District of Columbia
Office of the Corporation Counsel
District Building
Washington, D.C. 20004

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INTEREST OF *AMICI CURIAE*[1]

Amici are the chief legal officers of sixteen States and the District of Columbia, thirteen Governors, twelve Lieutenant Governors and 995 legislators from the fifty states,[2] who have a direct interest in the

[1] The parties have consented to the filing of this brief by letters that accompany the brief.

[2] A list of the *amici* appears in the appendix to this brief.

continued vitality of *Roe v. Wade*, 410 U.S. 113 (1973). *Amici* share a commitment to the preservation of fundamental individual rights and an abiding respect for the judiciary's constitutional role in securing those rights against infringement by the state and national governments.

Our experience and duties provide a unique perspective on governmental regulation of abortion. In our respective states, *amici* enact legislation, direct executive agencies in implementing legislation, and enforce state laws through criminal and civil sanctions. *Amici* are also obligated to protect the health and well-being of women in our states, which includes their right to safe and appropriate health care and their right to decide whether and when to bear children.

Amici have found the standard of review for the constitutionality of abortion regulations described in *Roe v. Wade* to be a workable and fair accommodation of state interests and individual rights. In *Roe*, this Court correctly held that a state must have a compelling interest to justify its regulation of a woman's fundamental right to choose whether to bear a child. That framework accords to states the necessary authority to regulate abortion in the genuine interest of promoting health and preserving potential life while also respecting the fundamental privacy rights of women.

As officials charged with enforcing laws, *amici* have a special interest in promoting respect for the doctrine of *stare decisis*. Adherence to *stare decisis* preserves stability in the law, prevents relitigation of divisive issues, and endows our citizens with confidence that laws will be interpreted consistently and fairly. A retreat from the uniform national standard for regulation of abortion provided by *Roe* will turn state legislatures into political battlegrounds, and divert attention from a multitude of critical economic and public policy issues that need to be addressed. The evisceration of a woman's fundamental constitutional right to choose abortion after it has been exercised for almost twenty years also threatens to jeopardize public faith in the legitimacy of our system of laws.

Because of our roles and responsibilities within the states, *amici* are uniquely qualified, and in fact compelled, to address the question of whether the Court should continue to protect a woman's deeply personal decision about childbearing as a fundamental

constitutional right. An abandonment by this Court of the fundamental right to choose and of the application of strict scrutiny to state abortion regulations will undermine our interest in protecting the health and well-being of women in our states, and in administering the law fairly and effectively.

SUMMARY OF ARGUMENT

In *Roe v. Wade* this Court properly recognized that a woman's decision whether or not to bear a child is encompassed in the fundamental constitutional right to privacy and that state interference with that decision is subject to strict scrutiny. For almost two decades, the states and millions of individuals have relied on the framework established by *Roe* and its progeny in structuring their affairs and lives. Like *Brown v. Board of Education*, 347 U.S. 483 (1954), *Roe* has become part of the political and moral fabric of this country. A decision that turns back the clock on women's ability to control reproduction and shape their futures would unjustifiably frustrate reasonable reliance upon the Court's judgments. A break from a precedent of such importance, particularly when it coincides with a shift in the membership of the Court, also threatens to erode public faith in the impartiality and legitimacy of law.

Under the doctrine of *stare decisis*, reversal of a precedent whose principles are deeply embedded in the national consciousness, in the lives of individuals, and in governmental decisionmaking can be justified only upon a demonstration that the precedent is harmful. No evidence exists that *Roe v. Wade* causes harm. But an abandonment of the fundamental right secured by *Roe* would almost certainly inflict injury — both on individual women and on the states.

Retreating from *Roe* and forcing states to determine the parameters of the right to choose abortion will significantly jeopardize the public health and welfare. Experience shows that women seek abortion in substantial numbers regardless of the state of the law. While women with money will often be able to secure safe and legal abortions by traveling to other states, recriminalization of abortion will drive women without sufficient resources to back-alley abortionists, where they risk grave harm to their health and even death. In addition, states that

continue to protect abortion will face a dramatic increase in the number of women seeking abortions, which will severely strain already overburdened health care systems and impede the delivery of medical services.

A failure by this Court to protect a woman's fundamental right to determine her reproductive destiny will also subvert law enforcement efforts. The criminal anti-abortion laws that may arise will be extremely difficult to enforce, and will divert resources from protecting the public from other crimes. History teaches that the attempt to enforce unpopular laws that are widely disobeyed and easily evaded by the affluent undermines the integrity of the criminal justice system and our institutions of government.

ARGUMENT

I. OUR CONSTITUTIONAL STRUCTURE AND THE DOCTRINE OF *STARE DECISIS* REQUIRE REAFFIRMANCE OF *ROE* v. *WADE*

A. *The Commands Of Stare Decisis, Always Weighty, Are Especially Compelling In The Case Of Roe v. Wade*

Nineteen years ago, seven Members of this Court recognized that the due process clause of the Fourteenth Amendment secures to women a fundamental right to choose whether or not to continue a pregnancy. Since *Roe v. Wade*, courts have scrutinized regulation of abortion strictly, demanding that a state's encroachment on that right serve a compelling interest and be narrowly drawn. Those who now urge this Court to abandon protection of the right to choose abortion and to thrust the issue back upon the states invite disaster. As chief legal officers, chief executives, and elected representatives of the people of our respective states, *amici* therefore urge the Court to be steadfast in its application of *Roe v. Wade*.

The doctrine of *stare decisis* requires strict adherence to past precedents "absent a showing of substantial countervailing considerations."[3] Although sometimes accorded less weight in cases

[3] Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 757 (1988).

interpreting the Constitution,[4] an examination of the doctrine's underlying purposes makes clear that it is especially compelling in the case of *Roe v. Wade*.

"Perhaps the most important . . . argument for *stare decisis* is one of public legitimacy." Powell, *supra*, at 16. It has long been recognized that "[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*," *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 478-79 (1987), and that it is the basis of "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. State Marine Lines*, 398 U.S. 375, 403 (1970). By providing a check against arbitrary and partial decisionmaking, *stare decisis* allows citizens to "have confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Dep't of Health v. Florida Nursing Homes Ass'n*, 450 U.S. 147, 154 (1981)(Stevens, J., concurring). Thus, the obligation of judges to be bound by the rules of cases already decided "is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting The Federalist No. 78, at 490 (H. Lodge ed. 1888) (A. Hamilton)).

Adherence to precedent also promotes stability and consistency in the law, "ensur[ing] that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). As a result, *stare decisis* permits citizens and governments alike to rely on the law in structuring their activities and affairs. *See, e.g., Williams v. Florida*,

[4] *See, e.g., Payne v. Tennessee*, 111 S.Ct. 2597, 2610 (1991). Most Justices and commentators, however, agree that its strictures apply even in constitutional cases. As former Justice Powell has remarked, "the elimination of constitutional *stare decisis* would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is. This would undermine the rule of law." Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 Journal of Supreme Court History 13, 16 (1991); *see also Payne v. Tennessee*, 111 S.Ct. at 2618 (Souter, J., concurring) ("Even in constitutional cases, [*stare decisis*] carries . . . persuasive force"); *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).

399 U.S. 78, 127 (1970) (Harlan, J., dissenting in part and concurring in part); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (remarking upon "the psychologic need to satisfy reasonable expectations").

The need for stability and legitimacy in the law weighs heavily in favor of abiding by the precedent of *Roe v. Wade* regardless of individual views on how the case should be decided if it arose *res nova* today.[5] Like *Brown v. Board of Education*, 347 U.S. 483, *Roe* has become part of the political and moral fabric of this country. Millions of women who have come of age in the last twenty years have structured their identities, their families, and their pursuits around the possession of a fundamental privacy right to decide whether or not or when to bear a child. *Roe* has also rooted itself in the practices and expectations of the States as sovereign entities, which have relied on *Roe* over the last two decades in developing a uniform statutory and regulatory framework within which health planning decisions are made.

This Court has consistently held that when individuals and governments have relied on a precedent, as they have on *Roe*, there should be extreme reluctance to overrule it. Only recently, this Court reaffirmed that "*[s]tare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations. . . ." *Hilton v. South Carolina Public Railways Comm'n*, 112 S.Ct. 560, 564 (1991). *See also Payne v. Tennessee*, 111 S.Ct. at 2610.[6] *Stare decisis*, after all, rests upon the "principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts." *Id.* at 2614 (Scalia, J., concurring). Yet if the Court were to abandon *Roe* now, it would needlessly and unjustifiably frustrate the settled practices and "reasonable expectations," *Helvering v. Hallock*, 309 U.S. at 119, of both vast numbers of women and governmental entities.

[5] *See Green v. United States*, 355 U.S. at 215 (Frankfurter, J., dissenting).

[6] The fundamental personal freedom secured by *Roe* is clearly not a "mere procedural or evidentiary rule," which the Court views as carrying diminished precedential weight. *Payne*, 111 S.Ct. at 2610. It is more akin to a "property or contract right" in that both categories of rights involve "strong reliance interests." *Id.*

Because *Roe v. Wade* is so deeply embedded in both individual and governmental decisionmaking, reversal or modification of its holding would also substantially undermine the rule of law. Never before has this Court overruled a case that recognized a fundamental personal freedom. A departure from the guarantee of a fundamental liberty that coincides with a shift in the membership of the Court would run athwart the principal objective the doctrine of *stare decisis* is intended to serve: to enable citizens "to presume that bedrock principles are founded in the law rather than the proclivities of individuals. . . ." *Vasquez v. Hillery*, 474 U.S. at 265-66. It would thereby undermine public confidence in "the wisdom of this Court as an institution transcending the moment," *Green v. United States*, 355 U.S. at 215 (Frankfurter, J., dissenting), with resulting damage to citizens' respect for the law.

Roe v. Wade's precedential status is entitled to great weight in another respect. The constitutional terrain it describes is an area which the Court long ago marked out as a "zone of privacy created by several fundamental constitutional guarantees." *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). A series of historic decisions leading up to *Roe* extended autonomy to individuals in matters relating to childrearing, marriage, and procreation.[7] Since *Roe*, this Court not only has repeatedly reaffirmed the existence of that zone of privacy when striking down restrictive abortion laws but also has relied upon it in reaching a variety of decisions outside the abortion area.[8] A repudiation of *Roe v. Wade* would therefore remove the constitutional girders of some

[7] *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Griswold v. Connecticut*, 381 U.S. 479; *Loving v. Virginia*, 388 U.S. 1 (1967); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[8] *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978)(invalidating state laws burdening the right to marry); *Carey v. Population Services International*, 431 U.S. 678 (1977) (invalidating prohibitions on distribution and advertisement of contraceptives); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (invalidating a zoning law that interfered with decisions as to family composition); *Whalen v. Roe*, 429 U.S. 589 (1977) (recognizing right to informational privacy); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974) (invalidating an employment rule burdening a woman's decision to bear a child).

of the Court's most important decisions in this century, and call into question an entire field of constitutional law.[9]

Because of the "bedrock" nature of the right it recognizes, the settled practices and expectations it has engendered, and its integral role in a foundational aspect of constitutional law, a reaffirmation of *Roe* commands exceptional consideration on *stare decisis* grounds.[10]

B. *No Circumstances Exist That Justify A Departure From Roe*

The proponent of overruling a precedent always bears a "heavy burden." *Vasquez v. Hillery*, 474 U.S. at 266. "Even in constitutional cases, [*stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.' " *Payne v. Tennessee*, 111 S.Ct. at 2618 (Souter, J., concurring) (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

In our system of law, a belief that a case was wrongly decided in the first instance is far from a sufficient justification for overruling it.[11] Because of the important policies advanced by *stare decisis*, this Court does not abandon a precedent absent a special showing that "changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective," *Vasquez*, 474 U.S. at 266, that the precedent is "unsound in principle," *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985), that it is "unworkable in practice," *id.* at 546, or that "the lessons of experience indicate that [a new rule] . . . would significantly advance the public interest." *United States v. Scott*, 437 U.S. 81, 101 (1978).

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[9] *See Hilton v. South Carolina Public Railways Comm'n*, 112 S.Ct. at 564 (if overruling precedent would "throw into doubt previous decisions from this Court," that result weighs "in favor of adhering to *stare decisis*").

[10] As one legal scholar has aptly explained, *stare decisis* serves "to prevent disruption of practices and expectations so settled, or to avoid the revitalization of a public debate so divisive, that departure from the precedent would contribute in some perceptible way to a failure of confidence in the lawfulness of fundamental features of the political order." Monaghan, *supra* note 3, at 750.

[11] Under American notions of *stare decisis*, "[e]ven an 'overriding conviction' of prior error is not enough [to justify overruling]; the precedent must have some palpable adverse consequences beyond its existence." Monaghan, *supra* note 3, at 758.

Roe does not suffer from any of the infirmities that justify the overruling of a precedent. In fact, a reversion to the pre-*Roe* regime would encourage divisive and inconsistent state regulation of a woman's abortion decision, disserving the public interest. *See* Points II and III, *post*. A healthy observance of restraint in judging, an interest served by adherence to the doctrine of *stare decisis*, counsels against overruling *Roe v. Wade*.

1. *Roe v. Wade Is Sound In Principle*

Almost twenty years ago, this Court held that the right of personal privacy — which finds its doctrinal sources in decisions dating back to the nineteenth century — "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. That holding was rooted in a solid line of cases establishing that individuals enjoy a fundamental liberty interest in matters related to childrearing, marriage, and procreation,[12] and it remains the governing law today.[13]

This Court has already found "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983). Among them were the special consideration afforded the issues in *Roe*, the solid majority it commanded,[14] and the repeated adherence in subsequent cases to the basic principles there announced. Indeed, the Court not only has explicitly reaffirmed *Roe*, but has repeatedly relied on it to strike down regulations impermissibly interfering with a woman's right to have an abortion.[15]

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[12] *See* cases cited *supra* note 7.

[13] Chief Justice Rehnquist's plurality opinion in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), did not command a majority of the Members of the Court and therefore its reasoning is not binding. *See, e.g., CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 81 (1987). Justice O'Connor, along with the four dissenting Justices, refused to question the validity of *Roe*. 109 S.Ct. at 3060-61 (O'Connor, J., concurring in part and concurring in the judgment).

[14] *Compare Payne*, 111 S.Ct. at 2611 (justifying overruling of *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), in part on the ground that they were "decided by the narrowest of margins").

[15] *See Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (striking down mandatory dissemination of information designed

(Footnote continued)

No doctrinal development has appeared since *Roe v. Wade* that diminishes the conclusion of seven Members of the Court that the liberty component of the due process clause of the Fourteenth Amendment protects as fundamental the right of a woman to choose whether to terminate a pregnancy. On the contrary, *Roe*'s holding has been relied on not only in abortion cases but in a variety of decisions in the privacy area outside the abortion context.[16] Because this Court has repeatedly followed its decision, the right recognized in *Roe* has become not only a part of our constitutional landscape, but an element widely perceived to be part of the nation's social fabric.

Roe v. Wade falls squarely within the historical and rational traditions of this Court in elaborating the meaning of the due process clause under which liberty is a "continuum which ... includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Those who now urge that the issue be remitted to fifty or more legislatures as a proper subject of majoritarian rule fail to recognize that the majority, in adopting the Fourteenth Amendment, endorsed the principle that the judiciary is the guarantor of personal freedoms.

Under our Constitution, the judiciary is entrusted with the critical task of safeguarding the most fundamental aspects of people's lives – their personal sovereignty – from interference by legislative bodies. As this Court has declared:

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to discourage abortion, two-physician requirement for post-viability abortions, and mandatory medical procedures for possibly viable fetuses); *Akron*, 462 U.S. 416 (1983) (invalidating 24-hour waiting period, mandatory dissemination of information designed to discourage abortions and hospitalization requirement for second trimester abortions); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983)(striking down requirements unrelated to maternal health for second trimester abortions); *Colautti v. Franklin*, 439 U.S. 379 (1979)(striking down mandatory medical procedures for possibly viable fetuses); *Bellotti v. Baird*, 443 U.S. 622 (1979)(overturning parental consent requirement); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976)(overturning parental and spousal consent requirements).

[16] *See* cases cited *supra* note 8. *Cf. Puerto Rico v. Branstad*, 483 U.S. 219, 227-30 (1987) (overruling *Kentucky v. Dennison*, 24 How. 66 (1861), because the holding of *Dennison* "is fundamentally incompatible with more than a century of constitutional development" and "the basic consitutional principles now point as clearly the other way").

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's ... fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).[17] That the passions which attend the abortion debate make judicial resolution difficult does not relieve this Court of its constitutional duty. Rather, the Court's duty reaches its zenith when the issue, as here, is one of a "sensitive and emotional nature," generating heated public debate and controversy, "with vigorous opposing views" and "deep and seemingly absolute convictions." *Roe*, 410 U.S. at 116. For it is precisely then that majoritarian institutions are the least reliable guarantors of individual rights and liberties. *See, e.g., Brown v. Board of Education*, 347 U.S. 483; *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

The federal structure of our government offers abundant opportunities for states to serve as laboratories for new social and economic ideas. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But there is a critical difference between a state's experimentation within a sphere of power ceded to government by the individual and the state's usurpation of those powers and rights reserved to the individual. A state law infringing a fundamental individual liberty protected by the Fourteenth Amendment cannot be upheld on federalism grounds. *See New State Ice*, 285 U.S. at 279-80. After all, "[t]here are limits to the extent to which a legislatively represented majority may conduct ... experiments at the expense of the dignity and personality" of the individual. *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring). Because "[f]ew decisions are more personal and intimate, more properly private, or more basic

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[17] *See also Garcia*, 469 U.S. at 565 n.8 ("One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process.") (Powell, J., dissenting, joined by Burger, C.J., Rehnquist and O'Connor, JJ.); *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962).

to individual dignity and autonomy, than a woman's decision . . . whether or not to end her pregnancy," *Thornburgh*, 476 U.S. at 772, the Court correctly decided in *Roe v. Wade* that a woman's right to control her reproductive destiny cannot be a candidate for state-by-state experimentation.

2. *Changes In Society And In Law Since Roe Was Decided Fortify, Not Weaken, Its Validity*

In the two decades since *Roe* was decided, society has witnessed enormous changes in the status of women. Women, who have entered the workforce in staggering numbers, demand and are entitled to participate as equals in the social and economic life of this country. Those changes, however, do not demonstrate that the principles of *Roe v. Wade* must be rejected as "no longer suited to contemporary life." *Cf. Williams v. Florida*, 399 U.S. at 128 (Harlan, J., dissenting in part and concurring in part).[18] On the contrary, women's growing independence as citizens depends on freedom from forced childbearing and on the ability to control whether or when to have children. The advances women have made toward equality do not support, let alone justify, reinstating a rule of law that deprives them of reproductive autonomy and consigns them purely to the domestic sphere.

Law has evolved to keep pace with the changing role of women. Although at one time a distinguished Member of the Court concluded that the Fourteenth Amendment did not prevent a state from denying women admission to the practice of law because the "paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother," *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring), such views have fallen into serious disrepute.[19] During the last two decades, the Court has repeatedly recognized that the Constitution will not tolerate state actions that coerce women to fill

[18] *Cf. The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 455-56 (1851) (overruling 1825 precedent limiting admiralty jurisdiction to tidal waters on account of changed boundaries of U.S. territory and concomitant increase in inland waters).

[19] "'No longer is the female destined solely for the home and the rearing of the family and only the male for the marketplace and world of ideas.' " *Orr v. Orr*, 440 U.S. 268, 280 (1979) (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975)).

stereotypical domestic or nurturing roles;[20] and has acknowledged the compelling governmental interest in eradicating sex discrimination.[21] This Court's recognition of women's right to autonomy and equality under the law strongly support reaffirmance of *Roe v. Wade*.[22]

3. *Roe Is Workable In Practice*

Roe provides a workable, predictable framework within which states can regulate abortion and courts can review such regulations. Although legislative responses have frequently required the Court to delineate the fundamental right to choose and to define the limits on the states' authority to regulate abortions, the need for the Court to furnish guidance in this area does not argue for a doctrinal retraction of *Roe v. Wade*. Constitutional adjudication of rights secured by the Bill of Rights often involves complicated tasks of definition and line drawing.

In comparison to other distinctions articulated by this Court in constitutional cases, however, the *Roe* framework provides clear guidance to state governments and lower courts. It guarantees that the state may not regulate the abortion procedure prior to viability unless the regulation is necessary to protect a woman's health, provided that the state may not restrict abortions after viability in a way that harms the woman's life or health.[23] *See Roe*, 410 U.S.

[20] *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 725-26 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973).

[21] *See Roberts v. United States Jaycees*, 468 U.S. 609, 625-26 (1984) (noting "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women").

[22] *Cf. Patterson v. McLean Credit Union*, 491 U.S. at 174 (deep national commitment to eradicating race discrimination supports adherence to holding of *Runyon v. McCrary*, 427 U.S. 160 (1976), that 42 U.S.C. § 1981 applies to private conduct whether holding was "right or wrong as an original matter").

[23] Contrary to some predictions, changes in science and technology since *Roe* was decided have not undermined its validity. No technology has appeared that lowers the threshold during pregnancy at which a fetus can survive separate from the woman. Medical authorities have concluded that viability exists – and is likely to remain fixed – at the 24th week of pregnancy. *See* Maureen Hack & Avroy A. Fanaroff, *Outcomes of Extremely Low Birth Weight Infants Between 1982 and 1988*, 321 New Eng. J. of Med. 1642, 1647 (1989); *see also Fetal Extrauterine Survivability*, Report to the New York State Task Force On Life and Law 10 (1988).

at 163-64; *Akron*, 462 U.S. at 428-30. These basic guidelines have neither proved unduly "confusing" nor "defied consistent application." *Cf. Payne*, 111 S.Ct. at 2611. The results of two decades of their application in the courts have been largely consistent and predictable.[24]

The opposition by some to the principle that a woman has a constitutionally protected right to decide whether or not to continue her pregnancy should not be confused with any doctrinal or practical deficiency of *Roe*. It "should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Education*, 349 U.S. at 300. Individuals, government, and the medical profession all operate with the benefit of nearly twenty years of experience under *Roe*. Far from lessening litigation or dampening the controversy, a new standard would only increase contention.

Furthermore, as discussed in Points II and III, *post*, "the lessons of experience" teach us that overruling *Roe* would not "significantly advance the public interest." *Cf. United States v. Scott*, 437 U.S. at 101. On the contrary, modification or abandonment of *Roe* would inflict harm on women, wreak havoc on public health care systems, and undermine law enforcement efforts in the states. Departure from precedents is rarely if ever defensible when "the effects of the precedents are not harmful, and overruling the precedents would produce exceptionally harmful results."[25] As representatives of state governments that will be deeply affected by any reversal or erosion of *Roe*, *amici* submit that a concern for the public interest demands reaffirmation of *Roe*'s principles.

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[24] *See* cases cited *supra* note 15. This Court has also upheld certain kinds of restrictive abortion legislation on the ground that they do not interfere with the rights recognized in *Roe*. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980) (upholding ban on public funding of abortions on the ground that ban did not interfere with right recognized in *Roe*); *Maher v. Roe*, 432 U.S. 464 (1977) (same).

[25] Monaghan, *supra* note 3, at 760; *cf. Payne*, 111 S.Ct. at 2613 (Scalia, J., concurring) (abandonment of rule excluding victim-impact evidence in sentencing hearings justified when the precedent "significantly harms our criminal justice system").

II. THIS COURT'S FAILURE TO REAFFIRM THAT THE CONSTITUTION PROTECTS A FUNDAMENTAL RIGHT TO MAKE CHOICES ABOUT CHILDBEARING WILL JEOPARDIZE THE HEALTH OF THE NATION'S WOMEN

The consequences for women's health in this country will be devastating if the Court jettisons *Roe v. Wade*. American women will not abandon exercise of a right so long enjoyed and so basic to their ability to control their destiny.[26] Some will seek to circumvent restrictive laws within their own states, increasing the risk of abortion-related death, injury and illness. Others will flee to states where abortion remains legal, taxing heavily burdened health care systems and displacing residents of those states. Experience shows that women of color and poor women will suffer the most. Overturning *Roe v. Wade* thus promises to restore a brutal regime in many states which this Court properly ended two decades ago.

A. *Permitting States To Criminalize Abortion Will Inflict Severe Harm On Women Who Seek To Terminate Their Pregnancies*

A return of abortion to a criminal status in some states will not end abortion; women will find ways to circumvent the prohibition just as they did before *Roe*. Women who live in states

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[26] Legalization did not significantly increase the numbers of women obtaining abortions. Rather it guaranteed that abortions that had been obtained clandestinely could be secured under safe, legal conditions, thus reducing the mortality and morbidity rate of women obtaining them. *See* Alan Guttmacher Institute, *Safe and Legal: 10 Years' Experience With Legal Abortion in New York State* 17, 23 (1980) [hereinafter AGI, *Safe and Legal*]. Statistics from other states are similarly revealing. *Id.* at 23; *see also People v. Belous*, 458 P.2d 194, 201 (Ca. 1969), *cert. denied*, 397 U.S. 915 (1970) (prior to California's passage of Therapeutic Abortion Act of 1967, between 35,000 and 100,000 criminal abortions were performed annually in California); *People v. Barksdale*, 503 P.2d 257, 265 nn. 7 & 8 (Ca. 1972) (by 1970, approximately 116,749 legal abortions were performed in California - a slight increase in the number of abortions, adjusted for population growth, that occurred before legalization). Similarly, only a 10% rise was reported for Oregon. AGI, *Safe and Legal*, *supra*, at 23. The annual number of 1.6 million women obtaining abortions remained relatively unchanged between 1980 and 1989. Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Fam. Plan. Persp. 102 (1990).

that criminalize abortion and wish to terminate their pregnancies will have three alternatives. First, if they have the financial means, they can travel to a state that offers legal abortion. Second, they can attempt to obtain an illegal or self-induced abortion in their own state. Third, they can carry the pregnancy to term. Each option dramatically increases the risks to women's health. As there continues to exist a two-tiered health care system, particularly with regard to abortion services,[27] poor women, a disproportionate number of whom are women of color, will suffer the greatest burdens of the recriminalization of abortion.[28]

1. *Travel Out-of-State*

Requiring a woman to travel out of state for an abortion causes delay, and significantly increases the risk to her health. After the first eight weeks of pregnancy, the risk of major complications from abortion increases about 15 to 30 percent for each week of delay.[29] A woman forced to travel faces not only the costs of

[27] Legitimate physicians willing to certify a medical indication for abortion will frequently be available to women with financial resources. Rachel Benson Gold, Alan Guttmacher Institute, *Abortion and Women's Health, A Turning Point for America?* 3 (1990); President's Comm'n on Law Enforcement and Admin. of Justice, *Task Force Report: The Courts* 105 (1967) [hereinafter *Task Force Report*]. *See also Harris v. McRae*, 448 U.S. 297, 330 n.4 (Brennan, J., dissenting).

[28] Women of color are disproportionately affected because they constitute a disproportionate percentage of the poor. In 1990, 35.5% of Black women, 29.9% of Hispanic women, and 12% of white women lived in poverty, although Blacks constituted 12.4% of the general population, Hispanics 8.6%, and whites 83.9%. (Hispanics can be of any race, but for purposes of this discussion they are included as "women of color" or "nonwhite women.") Bureau of Census, U.S. Dept. of Commerce, *Current Population Reports Consumer Income*, Series P-60, No. 175 in *Poverty in the U.S.: 1990*, (1990) (tables 1,5). Because abortion rates are negatively associated with income, restriction on abortion will disproportionately affect the poor, and thus, women of color. Stanley K. Henshaw et al., *Characteristics of U.S. Women Having Abortions, 1987*, 23 Fam. Plan. Persp. 75, 77 (1991). Gold, *supra* note 27, at 19 (nonwhite women are twice as likely as white women to utilize abortion services).

[29] Willard Cates, Jr. et al., *Morbidity and Mortality of Abortion in the United States in Abortion and Sterilization: Medical and Social Aspects* 155, 158 (Hodgson, ed. 1981). However, the risks of legal abortion never exceed the risks of childbirth. Christopher Tietze & Stanley K. Henshaw, Alan Guttmacher Institute, *A World Review 1986* 110 (1986).

the abortion but the costs of travel, food and accommodations.[30] Delays may be caused by difficulties in raising the funds necessary to secure an abortion, in locating an out-of-state provider and in arranging transportation.[31] Women of color will be least likely to be able to afford an out-of-state abortion.[32]

2. *Illegal Abortions*

Women intent on terminating their pregnancies but unable to afford out-of-state abortions will be forced to back-alley abortionists or to attempt self-abortion. Although the risk of death from legal abortion is never higher than the risk of death from childbirth, the mortality rate for illegal abortion is much higher than that for legal abortion.[33] The mortality ratio for legal abortions in 1981 was .4 deaths per 100,000 abortions and for childbirth was 7.2 per 100,000 births; the ratio for illegal abortion has been estimated to reach or exceed 1,000 deaths per 100,000 illegal abortions.[34]

[30] Almost 50% of women who obtained abortions after 16 weeks of pregnancy attributed their delay to difficulty in making arrangements, the major problem being raising the money needed. Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 Fam. Plan. Persp. 169, 174 (1988).

[31] *Id.* at 174-75. *See infra* note 59.

[32] The farther a woman has to travel for an abortion, the less likely she is to obtain one. Black women, and especially Black teenagers, are least able to surmount the barriers imposed by travel requirements. James D. Shelton et al., *Abortion Utilization: Does Travel Distance Matter*, 8 Fam. Plan. Persp. 260, 262 (1976).

[33] Tietze, *supra* note 29, at 109-10.

[34] *Id.* at 111 (estimate for illegal abortions performed internationally). In Romania, after restrictive abortion legislation was adopted in 1966, the number of deaths attributed to illegal abortion increased almost three-fold between 1966 and 1968; in 1971 there were more than four times as many deaths as in 1966. Institute of Medicine, *Legalized Abortion and the Public Health* 84 (1975). In 1980, 84% of maternal deaths in Romania were due to illegal abortion. Bea J. van den Berg & Chin Long Chiang, *Maternal Mortality and Differentiation By Cause of Death* 239, 250 (1986).

In the United States, "the number of reported deaths from [illegal or self-induced] abortions declined steadily as less restrictive abortion legislation was passed and implemented throughout the country."[35] Before the legalization of abortion, twenty percent of all deaths related to childbirth and pregnancy occurred because of illegal abortion,[36] and complications from illegal abortion were a major cause of hospital admission.[37] Just as was the case before abortion was legalized, it is likely that women of color will die or suffer health complications from illegal abortions at a disproportionate rate.[38]

Some women not able to obtain an out-of-state abortion will attempt self-abortion. Literature discussing illegal abortion options for women commonly cite examples of women dying from attempts to self-abort using coat hangers or ingesting poisons.[39]

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[35] Institute of Medicine, *supra* note 34, at 85. Legalization of abortion significantly reduced abortion-related deaths and illness. Studies in California and New York showed that criminal abortion was the leading cause of deaths related to pregnancy; the most common victims were married women with several children who attempted to self-abort. Harvey L. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. Crim. L. and Criminology and Police Sci. 13 (1969).

[36] Willard Cates, Jr., *Legal Abortion: The Public Health Record*, 215 Sci. 1586 (1982).

[37] Gold, *supra* note 27, at 6.

[38] More than two-thirds of women who died from illegal abortions between 1972 and 1974 were women of color; the mortality rate from illegal abortions for nonwhite women was 12 times the rate for white women. *Id.* at 5.

[39] *See* Nancy Binken et al., *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Fam. Plan. Persp. 163, 164 (1982) (methods included intrauterine insertion of coat hangers, glass thermometers or metal objects; instillation of cleaning solutions into the uterine cavity); Cynthia Gorney, *Abortion in the Heartland*, Wash. Post, Oct. 2, 1990 at 13 (Health, A Weekly J. of Med., Sci. and Soc'y) (before legalization, a New York City woman tried to induce her abortion by eating rat poison that irreversibly destroyed all her organ systems. "She did abort," the physician attending her at the time recalled, "just before she died"); Barbara Brotman, *Secret Abortion Group of '60s Prepares for Return*, Chi. Trib. Aug. 28, 1989, at 1. Following the passage of the Hyde Amendment, Medicaid-eligible women unable to afford abortions similarly lost

(Footnote continued)

3. *Carrying To Term*

Women forced to carry unwanted pregnancies to term will face a higher risk of death or pregnancy-related complications than those able to obtain legal abortions.[40] The risk of incurring major surgery as a result of carrying a pregnancy to term is almost 100 times the risk of surgery due to a legal abortion.[41] Many women seeking abortions also have health problems that make them more likely to experience complications giving birth.[42] Pregnancy can seriously endanger a woman's health by exacerbating medical conditions such as lupus, multiple sclerosis, asthma, diabetes, high blood pressure and AIDS.[43] The risk of complications is still greater when the pregnancy is unwanted.[44]

Women with unwanted pregnancies are also less likely to receive early prenatal care. In a 1988 study, 73 percent of wanted births received first-trimester prenatal care, whereas only half

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their lives or were seriously injured attempting to self-abort. In Georgia, a Medicaid-eligible woman who had had 12 previous pregnancies attempted to induce her abortion with a glass thermometer. After two months of unsuccessful efforts, she died of a pulmonary embolism following a hysterectomy. In Ohio, a pregnant teenage mother shot herself in the stomach, reportedly after being denied an abortion by a public hospital because she lacked $600 in cash. James Trussell et al., *Impact of Restricting Medicaid Financing for Abortion*, 12 Fam. Plan. Persp. 120, 129 (1980).

[40] Susan Harlap et al., Alan Guttmacher Institute, *Preventing Pregnancy, Protecting Health: A New Look at Birth Control Choices in the United States* 96 (1991); *see* Tietze, *supra* note 29, at 110.

[41] Cates, *supra* note 36, at 1587. Nearly 25% of term births occur by caesarean section, a major surgical procedure that subjects women to substantial risks to life and health, whereas .07% of first trimester abortions entail intra-abdominal operations, and second trimester abortions lead to major surgery in only .1 to .2% of cases. *Id.*; Placet & Taffel, *Recent Patterns in Caesarean Delivery in the United States*, 5 Obstet. Gynec. Clin. N.A. 607 (1988).

[42] Gold, *supra* note 27, at 36.

[43] *See* J. Pritchard et al., *Williams Obstetrics* 597, 600, 609, 619-20 (17th ed. 1985).

[44] Cates, *supra* note 36, at 1587 (women with unwanted pregnancies have higher postpartum infection and hemorrhage rates than women with favorable attitudes toward their pregnancies).

of all unwanted births received such care.[45] Numerous studies show that women receiving prenatal care have better birth outcomes, including fewer low birth weight babies, than women receiving no care.[46] It is likely that infant mortality rates and low birth weight will increase in those states that re-criminalize abortion, resulting in an increased need for neonatal intensive care, and higher hospital costs. Because on average they have less money and poorer health,[47] women of color will be less able than other women to obtain legal abortions, more frequently required to carry unintended pregnancies to term, and thus subject to the greatest health risks for themselves and their infants.[48]

The implications of forcing teenagers to bear children are particularly disturbing. Of more than one million pregnancies to teenagers every year, eighty-four percent are unintended. The half who carry their pregnancies to term face detrimental health, social and economic consequences.[49]

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[45] Elsie R. Pamuk & W.D. Mosner, *National Center for Health Statistics* 11 (1988). Prenatal care during the first trimester is important because it is at that stage that counseling about nutrition, smoking, and alcohol and drug consumption during pregnancy can make the greatest difference. The first trimester is also the best stage to identify medical conditions that may complicate pregnancy or endanger the woman's health. *Id.*

[46] *Id.*; Alan Guttmacher Institute, *Teenage Pregnancy: The Problem that Hasn't Gone Away* 29 (1981) [hereinafter AGI, *Teenage Pregnancy*]. Low birth weight is a major cause of infant mortality and a host of serious childhood illnesses, birth injuries and neurological defects, including mental retardation. *Id.* After legalization of abortion in New York State, infant mortality rates declined to record lows. Jean Pakter et al., *Two Years Experience in New York City With the Liberalized Abortion Law – Progress and Problems*, 63 Am. J. Pub. Health 524 (1973).

[47] *See* Gold, *supra* note 27, at 32.

[48] *See, e.g.*, AGI, *Teenage Pregnancy*, *supra* note 46, at 29 (health risks of pregnancy, maternal mortality and other complications of giving birth are greater for Black women than for white women; low birth weight rates among Black infants are higher than among whites).

[49] Elizabeth Armstrong, Center for Population Options, *Teenage Pregnancy and Too-Early Childbearing: Public Costs, Personal Consequences* 2, 26, 29 (5th ed. 1990).

Adolescents aged 15 to 19 are more than 24 times more likely to die from childbirth than from an early legal abortion.[50] During pregnancy, teenagers are at a much higher risk of suffering from serious medical complications, including anemia, pregnancy-induced hypertension (toxemia), cervical trauma and premature delivery, than older women. For those under 15 years, the maternal mortality rate is 60 percent greater than it is for women in their twenties.[51]

Children born to teenage mothers are nearly twice as likely to die in their first year of life as those born to mothers in their twenties.[52] Teenage mothers are more likely than teenagers who delay childbearing to have low-status, low-paying jobs or to be unemployed.[53] Children of teen parents are also more likely to continue the cycle of poverty and early childbearing and to become teen parents themselves.[54]

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[50] Rebecca Stone, Center for Population Options, *Adolescents and Abortion, Choice In Crisis* 7 (1990).

[51] Armstrong, *supra* note 49, at 27. Medical complications frequently arise from late or no prenatal care in teenage pregnancy. Carolyn Mackinson, *Health Consequences of Teenage Fertility*, 17 Fam. Plan. Persp. 132, 134 (1985). In 1978, two-thirds of mothers under 15, and half of mothers aged 15-17, received no prenatal care during the first three months of pregnancy, compared to 85% of older women. AGI, *Teenage Pregnancy*, *supra* note 46, at 59. One-fifth of those under 15 and one-eighth of those 15-17 received no prenatal care until the last trimester of pregnancy. Mothers aged 15 and younger are twice as likely as those aged 20-24 to have low birth weight babies. Among all teenage mothers, the risk of having low birth weight babies is 39% higher than for those aged 20-24. *Id.* at 29.

[52] AGI, *Teenage Pregnancy*, *supra* note 46, at 27.

[53] *Id.* at 30. A national study that controlled for race, socioeconomic status, academic achievement, and educational expectations found that mothers who had given birth before they were 18 were only half as likely to graduate from high school as those who postponed childbearing until after age 20. *Id.*

[54] *Id.* at 35. In 1975, about half of the $9.4 billion invested in the federal Aid to Families with Dependent Children programs went to families in which the mother had given birth as a teenager. *Id.* at 32.

B. *States Where Abortion Remains Legal Can Expect An Influx Of Non-residents, Overburdening Abortion Providers In Those States And Displacing Resident Women From Securing Timely Abortion Services*

Restriction of abortion services in a state will cause women who can muster the resources to flee to states that continue to safeguard a woman's right to choose. The increased demand for abortion services in states that permit abortions will impose additional burdens on the health care systems and residents of those states.

New York State, for example, was flooded with non-resident women seeking abortion services after July 1, 1970, when it permitted abortions for consenting women less than 24 weeks pregnant. In New York City, from July 1970 to June 1972, 65.7 percent of abortions were provided to non-residents.[55] Throughout New York State, 61 percent of those obtaining abortions in 1971 and 1972 were non-residents.[56] After *Roe*, the proportion dropped precipitately; by 1979 non-resident women obtained only about 7 percent of all abortions in New York State.[57] The experiences of other states demonstrate that the events in New York were not aberrant.[58]

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[55] Pakter, *supra* note 46, at 524.

[56] Robert P. Whalen, New York State Department of Health, *Report of Selected Characteristics of Induced Terminations of Pregnancy Recorded in New York State, January - December 1975 with Five Year Summary* 37 (Table 27).

[57] AGI, *Safe and Legal*, *supra* note 26, at 9.

[58] An exodus of minors to other states occurred in 1981 after Massachusetts passed a parental consent law. At least 1,800 more Massachusetts minors traveled to five surrounding states without parental consent laws during the 20 months after enactment than had done so previously. Virginia G. Cartoof & Lorraine V. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 398 (1986). Nevertheless, Massachusetts minors continued to conceive, abort, and give birth in the same proportions as before the law was implemented. *Id.* at 400. After Rhode Island passed its parental consent law in 1982, 49% of minors who contacted clinics in their state obtained abortions out of state. Stone, *supra* note 50, at 13. In 1988, three years after Missouri began enforcing its parental consent law, there were 300 fewer teenage abortions performed in the state, and almost half that number of teenagers went to Kansas for abortions. Missouri Dept. of Health, *Missouri Monthly Vital Statistics* (Jan. 1990).

The increased numbers of non-resident women seeking abortions or related medical services in states where abortion remains legal will strain already overburdened health care systems. Many non-resident women will be delayed in obtaining abortions due to their inability to obtain proper counseling in their home states or a lack of resources.[59] As a result, abortion providers will be faced with an increased number of late, more complicated and more dangerous abortions, which tend to result in more frequent hospitalizations.[60] It is likely that women who must travel to states where abortion remains legal will compete with and displace a number of residents of the states who also must be hospitalized.

This Court's failure to protect the right to choose abortion will also increase the barriers to legal abortion that exist for resident women by exacerbating the scarcity of physicians able and willing to perform them. Many physicians able to provide abortion services do not do so because they and their families will be harassed by anti-abortion groups.[61] If this Court were to permit

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[59] Non-residents obtaining abortions in New York, for example, have been more likely to obtain abortions after twelve weeks than New Yorkers. AGI, *Safe and Legal*, *supra* note 26, at 19. Inability to locate a provider and make arrangements to obtain an abortion are significant factors leading to delay. Torres, *supra* note 30, at 174-75. Delay also increases costs, thereby resulting in even further delay. AGI, *Safe and Legal*, *supra* note 26, at 14; *see also* Stanley K. Henshaw et al., *Abortion Services in the United States, 1981-1982*, 16 Fam. Plan. Persp. 119, 126 (1984) (abortion fees are significantly higher for pregnancies past 12 to 14 weeks); Stanley K. Henshaw et al., *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63, 69 (1987).

[60] *See generally* J. Wilson et al., *Obstetrics and Gynecology* 207 (8th ed. 1987); David A. Grimes, *Second Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260, 263 (1984) (the risk of death from abortions performed at 16 or more weeks is 24 times greater than from abortions performed at 8 weeks or earlier). This Court has recognized that "time, of course, is critical in abortion." *Doe v. Bolton*, 410 U.S. 179, 198 (1973); *see also Akron*, 462 U.S. at 450-51.

[61] National Abortion Federation, American College of Obstetricians and Gynecologists, *Who Will Provide Abortions? Ensuring the Availability of Qualified Practitioners* 8 (1990) [hereinafter NAF, ACOG]. One doctor who has had rocks thrown through the windows of his clinic and shots fired through the waiting room walls characterizes his practice as "working in a war zone." Mimi Hall, *Legal Abortions Tougher To Get*, USA Today, May 1, 1991, at 7A. Other harassment includes the use of picketers at physicians' homes who

(Footnote continued)

states to enforce laws criminalizing abortion, anti-abortion harassment will concentrate on states where abortion services remain legal. That will serve further to discourage physicians from providing such services. At the same time, abortion training opportunities in residencies for obstetrics and gynecology are declining.[62] Although rural areas have been particularly affected by the scarcity of physicians who perform abortions,[63] the shortage also impairs access to abortion services in cities.[64]

A certain result of the heightened demand for abortion services in states where abortion remains legal will be an increase in illegal, health-endangering practices. Although abortion has been legal in this country for almost twenty years, illegal abortion mills continue to exist for a certain population of women.[65] A dwindling in the number of legitimate physicians who perform abortions, together with an increased demand for their services from out-of-state women, will likely result in a proliferation of abortion mills.[66] The inaccessibility of legal abortion will force resident women, especially those who are poor, non-English speaking, least educated, and least able to navigate bureaucracies,

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distribute pictures of aborted fetuses, and physicians' children being told at school that their parents kill babies. Gorney, *supra* note 39, at 15.

[62] Philip D. Darney et al., *Abortion Training in U.S. Obstetrics and Gynecology Residency Programs*, 19 Fam. Plan. Persp. 158, 161 (1987) (the proportion of programs offering training declined 22% from 1976 to 1985); NAF, ACOG, *supra*, note 61, at 8.

[63] *See* Henshaw, *supra* note 26, at 104. Some states, such as North Dakota and South Dakota, have only one abortion provider. *Id.*

[64] NAF, ACOG, *supra* note 61, at 4.

[65] In 1978, investigations in Detroit, Los Angeles, Chicago, and New York uncovered illegal clinical practices where "abortion" procedures were performed on non-pregnant women, operations were performed by unlicensed personnel, and facilities operated without licenses. Cates, *supra* note 36, at 1588-89. Women of color vastly outnumber white women among those who die as a result of illegal abortions. Between 1975 and 1979, 82% of the women who died following illegal abortions were Black and Hispanic. Binken, *supra* note 39, at 166.

[66] *See infra* text accompanying note 80.

to utilize abortion mills.[67] Although many women will be attracted to such abortionists because of the promise of short-term savings, they and society will pay considerably more in the long term for the illegal services they are forced to obtain.

III. THIS COURT'S FAILURE TO PROTECT THE RIGHT TO CHOOSE ABORTION AS A FUNDAMENTAL RIGHT WILL UNDERMINE STATE LAW ENFORCEMENT EFFORTS

If this Court should eviscerate a woman's fundamental constitutional right to make decisions about childbearing, a patchwork of inconsistent state laws will replace the uniform system of laws now in place. Experience demonstrates that laws criminalizing abortion are unenforceable. Readopting them will breed cynicism toward institutions of government and engender contempt for law enforcement efforts. At the same time, new burdens will be imposed on law enforcement authorities, diverting their limited resources from the apprehension and prosecution of other criminals.

History teaches that citizens will engage in wide-scale disregard of laws that prohibit abortion.[68] During the 1960's, between 300,000 and a million *criminal* abortions were performed each year in the United States,[69] but an arrest was made at most in one case in a thousand,[70] and conviction rates were extraordinarily low.[71] The

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[67] *See* Robert D. McFadden, *Abortion Mills Thriving Behind Secrecy and Fear*, N.Y. Times, Nov. 24, 1991, at A1 (reporting the case of a 29-year-old Dominican woman who went to a doctor whose name she obtained from a Spanish language newspaper, largely because of his low fee; an incomplete abortion resulted and four days later she was hospitalized with a high fever and parts of the fetus that remained in her uterus had to be removed).

[68] Ziff, *supra* note 35, at 5; Kenneth R. Niswander, *Medical Abortion Practices in the United States in Abortion and the Law* 37 (Smith ed. 1967).

[69] Ziff, *supra* note 35, at 5; Harold Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy in Abortion and the Law* 72, 90 (Smith ed. 1967).

[70] *Task Force Report*, *supra* note 27, at 105; Ziff, *supra* note 35, at 8 ("The abortion statutes have been as unsuccessful in prohibiting abortions as the eighteenth amendment was in eradicating drinking").

[71] John Kaplan, *Abortion as a Vice Crime: A "What If" Story*, 51 Law & Contemp. Probs. 151, 165-67 (1988); Ziff, *supra* note 35, at 8.

sheer number of illegal abortions, the ambiguity of out-dated statutes, difficulties of proof, widespread opposition to the law, and the absence of complainants made prosecutions of those who violated anti-abortion laws the exception rather than the rule.[72]

A principal reason for the failure of enforcement efforts was the vagueness of the "justifiable abortion" exceptions to laws criminalizing abortion.[73] When prosecutors, physicians and women can discern in such provisions little to guide their conduct, inconsistency results.[74] For example, when thirteen states adopted the identical provisions of the Model Abortion Code,[75] the rates of legal abortion for women aged 15 to 44 varied markedly – from 1.5 percent in South Carolina to 26.7 percent in New Mexico.[76] If this Court restores to states the pre-*Roe*

[72] Kaplan, *supra* note 71, at 165-67; Ziff, *supra* note 35, at 8. *See also Application of Grand Jury*, 143 N.Y.S.2d 501 (App. Div. 1955) (court rejected efforts of the Brooklyn District Attorney, who surmised that "doctors have been reporting only a small percentage of the cases in which the abortion or miscarriage has been induced by 'criminal practice'", to subpoena *all* hospital records for persons treated for abortion or miscarriage (other than therapeutic) at Kings County Medical Center in New York).

[73] *See, e.g., People v. Barksdale*, 503 P.2d 257, 263-66 (Ca. 1969) (that portion of California statute which justified abortion where "continuation of pregnancy would gravely impair" mother's health was void for vagueness, and language establishing medical criteria failed to provide due process). *See also People v. Belous*, 458 P.2d 194 (Ca. 1969), *cert. denied*, 397 U.S. 915 (1970).

[74] *See* Niswander, *supra* note 68, at 56 (citing study where 11 hypothetical cases, considered typical applications for therapeutic abortion, were submitted in a survey to 29 hospitals. In response to those applications clearly failing to meet the statutory provisions for therapeutic abortion, 59% of the hospitals participating in the survey would have agreed to abort).

[75] *Model Penal Code* § 230.3 (Proposed Official Draft 1962) ("A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest or other felonious intercourse").

[76] Centers for Disease Control, U.S. Dep't of Health, Educ. and Welfare, *Abortion Surveillance, Annual Summary 1972* (April, 1974) (Table 22); Institute of Medicine, *supra* note 34, at 28.

authority to prohibit abortion, states that criminalize abortions will adopt different exceptions with varying degrees of vagueness.[77] As a consequence, inconsistent applications will abound within and among states, leading to selective prosecutions, inconsistent jury verdicts and an impairment of *amici*'s efforts to foster uniform law enforcement.[78]

A return of abortion to criminal status in some states will result in even more prevalent flouting of the law than existed two decades ago. Women will turn to sympathetic physicians, or worse, to criminal enterprises, such as abortion rings. A reversal of *Roe* will not deter abortion; it will instead transform millions of law-abiding women and physicians into criminals. Furthermore, as before *Roe*, women with financial resources will travel to other states or countries to circumvent the restrictions in their home states, leaving only those of limited means to face criminal prosecutions. Avoidance of restrictions by the affluent will breed cynicism about the law among those less fortunate, and have a corrosive effect on institutions of self-government.

In states that recriminalize abortion, the reallocation of resources necessary to enforce such laws will divert the resources of the police

[77] Existing statutes indicate some of the possible variations and difficulties of interpretation. *See, e.g.*, Utah Code Ann. § 76-7-302(3) (Supp. 1991) (post-viability abortion prohibited unless necessary to save the woman's life or to prevent grave damage to her medical health); Ind. Code Ann. § 35-1-58.5-2(3)(c) (West 1986) (post-viability abortion prohibited unless "necessary to prevent a substantial permanent impairment of the life or physical health" of the mother); Colo. Rev. Stat. § 18-6-101 (1986 & Supp. 1990) (enacted 1963) (abortion prohibited unless hospital board certifies that continuation of pregnancy is likely to result in the woman's death or "serious permanent impairment" of the mother's physical or mental health); 18 Pa. Cons. Stat. § 3211 (Supp. 1991) (abortion after 24 weeks prohibited unless necessary to preserve the woman's life or to "prevent a substantial and irreversible impairment of a major bodily function").

[78] A retreat from *Roe v. Wade* would create particularly serious problems for law enforcement in states that have abortion statutes still in place that are unconstitutional under the principles of *Roe*. In Maryland, for example, the law repealing Maryland's pre-*Roe* restrictive statutes, 1991 Md. Laws, ch.1, has been petitioned to referendum. If *Roe* is overruled, Maryland's repealed pre-*Roe* statutes will be effective at least until the Maryland General Assembly re-repeals them as an emergency measure or until at least 30 days after the vote on the referendum in November. Md. Const. art. XVI, §2; 74 Op. Att'y Gen. No. 89-045, at 271-72 (Md. Nov. 30, 1989).

from protecting the public from other crimes, and cause a "loss of morale and self-esteem among police who are obligated to engage in tasks which must seem to them demeaning or degrading or of little relevance to the mission of law enforcement."[79] Even in those states that continue to permit abortion, officials will be pressed to deal with a growing number of illegal abortion providers. The attraction of quick profits inevitably will cause some unscrupulous abortion practitioners to emerge;[80] preying on those desperate for an affordable abortion, they will use advertisements in newspapers and in phone books to lure women into unsafe and illegal settings. Even where abortion remains legal, state consumer protection agencies will need to step up enforcement of deceptive advertising laws against those who would make fraudulent promises.[81]

In states where abortion remains legal, law enforcement authorities will also face an increase in illegal anti-abortion activities. Some zealots, such as those in Operation Rescue, have undertaken a national campaign of lawlessness aimed at abortion providers.[82] *See N.O.W. v. Operation Rescue*, 914 F.2d 582

[79] *Task Force Report*, *supra* note 27, at 107. *See also* Leslie J. Reagan, *About to Meet Her Maker: Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867-1940*, J. of Am. Hist. 1240 (March 1991) (describing efforts of law enforcement officials and some medical personnel to force women who were dying from abortion-related complications to provide the name of the person who performed the abortion because such statements were admissable at trial as dying declarations). Police also frequently used female decoys to gain incriminating evidence against illegal abortionists. *See, e.g., People v. Miller*, 45 N.Y.S.2d 789 (App. Div. 1944).

[80] Ziff, *supra* note 35, at 5-6 (describing the operation of illegal abortion "mills" and "rings" in New York); Kaplan, *supra* note 71, at 163-65; *Task Force Report*, *supra* note 66, at 105 (describing a "black market" of abortions).

[81] The New York Attorney General, for example, has vigorously prosecuted clinics that advertise as providing "abortion services" but only provide anti-abortion counseling. *See, e.g., State v. Evergreen Assoc.*, No. 41237/87 (N.Y. Sup. Ct. judgment entered 1987); *State v. Mother and Unborn Baby Love, Inc.*, No. 412721/87 (N.Y. Sup. Ct. judgment entered 1987); *State v. Mother and Child Services, Inc.*, No. 41236/87 (N.Y. Sup. Ct. judgment entered 1987).

[82] *Oversight Hearings on Abortion Clinic Violence*, Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary, 99th Cong., 1st & 2nd Sess. (1985) [hereinafter *Oversight Hearings*].

(4th Cir. 1990), *cert. granted, sub. nom. Bray v. Alexandria Women's Health Clinic*, 111 S.Ct. 1070 (1991). Federal and state courts have enjoined their activities under civil rights, trespass and public nuisance laws, but the campaign persists.[83] Some states and cities have been forced to commence their own injunctive actions[84]; other jurisdictions have passed legislation to secure access to health facilities blocked by anti-abortion opponents.[85]

Those states will need to commit even greater enforcement resources to ensure that their citizens continue to have access to lawful medical services.[86] It is estimated that forty-seven percent of the nation's abortion providers experienced some form of anti-abortion harassment in 1985.[87] Nineteen percent of abortion clinics reported death threats against their staffs, and forty-eight percent reported bomb threats.[88] If *Roe v. Wade* is overruled, it is virtually certain that illegal anti-abortion activity will increase in states where abortion remains legal.

[83] *See State v. Horn*, 407 N.W.2d 854 (Wis. 1987); *State v. Scholberg*, 412 N.W.2d 339 (Minn. 1987); *Ingram v. Problem Pregnancy of Worcester, Inc.*, 486 N.E.2d 408 (Mass. 1986); *Hoffart v. State*, 686 S.W.2d 259 (Tex. 1985), *cert. denied*, 479 U.S. 824 (1986). *See also Bering v. Share*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987). *See also* Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 Harv. L. Rev. 1856 (1988) [hereinafter *Too Close For Comfort*].

[84] *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, No. 89-2487-F, 1991 WL 214047 (Mass. Super. 1991) (sustaining state's standing as plaintiff); *New York State N.O.W. v. Terry*, 886 F.2d 1339, 1349 (2d Cir. 1989) (granting City of New York's motion to intervene), *cert. denied*, 110 S.Ct. 2206 (1990).

[85] States with laws protecting access to medical facilities include Maryland, Nevada, Oregon, and Wisconsin. *See* NARAL Foundation/NARAL, *Who Decides? A State-By-State Review of Abortion Rights*, 52, 77, 101, 136 (1991). *See also Too Close For Comfort*, *supra* note 83, at 1857-59 (describing ordinance adopted by Boulder, Colorado).

[86] *Oversight Hearings*, *supra* note 82.

[87] Jacqueline Forrest & Stanley K. Henshaw, *The Harassment of U.S. Abortion Providers*, 19 Fam. Plan. Persp. 9, 13 (1987).

[88] *Id.* at 10.

In sum, this Court's failure to protect a fundamental right to choose abortion and to apply strict scrutiny to abortion regulations will undermine *amici*'s interest in uniform, effective law enforcement, diminish the states' ability to maintain public confidence in the law and divert resources and attention from the prosecution of other criminal conduct.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court to continue to protect a woman's decision whether or not to bear a child as a fundamental constitutional right and to apply strict scrutiny to state regulation of abortion under the uniform guidelines of *Roe v. Wade*.

JOHN MCKERNAN
Governor of the State of Maine

DEREK LANGHAUSER
Chief Counsel
Office of the Governor
State House Station # 1
Augusta, Maine 04333
(207) 289-3531

ROBERT ABRAMS
Attorney General of the State of New York
120 Broadway
New York, New York 10271
(212) 341-2250

JERRY BOONE
Solicitor General

MARY ELLEN BURNS
Chief Assistant Attorney General

SANFORD M. COHEN*
Assistant Attorney General In Charge Civil Rights Bureau
DONNA I. DENNIS
MARJORIE FUJIKI
SHELLEY B. MAYER
Assistant Attorneys General
(*Counsel of Record)

APPENDIX

APPENDIX

The following *amici*, including 13 Governors, 12 Lieutenant Governors, 16 Attorneys General, 995 State Legislators and the Mayor and Corporation Counsel for the District of Columbia, submit this brief on behalf of petitioners.

ALABAMA

State Representative Demetrius C. Newton

ALASKA

State Senator Virginia M. Collins
State Senator Drue Pearce
State Senator Pat Pourchot
State Senator Patrick M. Rodey
State Senator Arliss Sturgulewski

Speaker of the House Ben F. Grussendorf
State Representative Mark Boyer
State Representative Kay Brown
State Representative Betty Bruckman
State Representative Shirley Craft
State Representative Bettye Davis
State Representative Dave Donley
State Representative Johnny Ellis
State Representative David Finkelstein
State Representative Max F. Gruenberg, Jr.
State Representative Niilo Koponen
State Representative Eugene Kubina
State Representative Georgianna Lincoln
State Representative Tom Moyer
State Representative Mike Navarre
State Representative Fran Ulmer

ARIZONA

State Senator Lela Alston
State Senator Gus Arzberger

State Senator Chuck Blanchard
State Senator John Dougherty
State Senator Karan English
State Senator Stan Furman
State Senator John Greene
State Senator Jaime P. Gutierrez
State Senator Nancy Hill
State Senator Cindy Resnick
State Senator Carol Springer
Senate Minority Leader Alan J. Stephens

State Representative Linda Beezley
State Representative George Brooks
State Representative Carmen F. Cajero
State Representative Chris Cummiskey
State Representative Catherine Eden
State Representative Ruth E. Eskesen
State Representative Susan Gerard
State Representative Peter Goudinoff
State Representative Sue Grace
State Representative Lisa Graham
State Representative Herb Guenther
State Representative Benjamin Hanley
State Representative Bev Hermon
State Representative Roger Hooper
State Representative Herschella Horton
State Representative Phillip Hubbard
State Representative Jack B. Jewett
State Representative Sandra Kennedy
State Representative John Kromko
State Representative Jo Eddie Lopez
State Representative Patricia Noland
State Representative Ruben F. Ortega
State Representative Mike Palmer
State Representative Marion Pickens
State Representative Eleanor Schorr
State Representative Ruth Solomon

ARKANSAS

Governor Bill Clinton

State Senator Jay Bradford

State Representative Jim Argue, Jr.
State Representative Myra Jones

CALIFORNIA

Lieutenant Governor Leo T. McCarthy

State Senator Alfred E. Alquist
State Senator Leroy F. Greene
State Senator Gary K. Hart
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State Representative Barbara Notestein
State Representative Kimberly M. Plache
State Representative Rosemary Potter
State Representative David M. Travis
State Representative Robert L. Turner
State Representative Rebecca Young

WEST VIRGINIA

State Senator Sondra Moore Lucht
State Senator Martha G. Wehrle
State Senator J.M. "Mike" Withers

State Delegate Robert C. Beach
State Delegate Bonnie L. Brown
State Delegate Brenda Brum
State Delegate Ramona Gail Cerra
State Delegate Mary Pearl Compton
State Delegate Stephen L. Cook
State Delegate Charles H. Damron
State Delegate Vicki V. Douglas
State Delegate Joseph H. Farris
State Delegate Brian A. Gallagher
State Delegate David Grubb
State Delegate John C. Huntwork
State Delegate Nancy Kessel
State Delegate Charlotte R. Lane
State Delegate Perry E. Mann
State Delegate Dale Manuel
State Delegate Jerry L. Mezzatesta
State Delegate James Hanly Morgan
State Delegate Deborah F. Phillips

State Delegate Greg Sayre
State Delegate Barbara Sims
State Delegate John R. Taylor
State Delegate Martha Y. Walker
State Delegate Patricia H. White
State Delegate Stephen T. Williams

WYOMING

State Senator Dell Herbst

State Representative Sheila Arnold
State Representative Samuel E. Blackwell
State Representative Mark O. Harris
State Representative Harry B. Tipton
State Representative Carol Jo Vlastos